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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARDO FUENTES,

Defendant and Appellant.

B234530

(Los Angeles County
Super. Ct. No. BA365862)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Anne H. Egerton, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and David
Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Bernardo Fuentes appeals the judgment entered following his conviction by jury of assault with a firearm on a peace officer in which he personally discharged a firearm, and possession of a firearm by a felon. (Pen. Code, §§ 245, subd. (d)(1), 12022.53, subd. (c), former § 12021, subd. (a)(1).)¹ Fuentes contends the judgment should be modified to reflect a stay pursuant to section 654 of the concurrent term imposed for possession of a firearm by a felon. Fuentes also requests an independent review of the in camera hearing on his *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531). (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.)

Fuentes's sentencing contention fails because the evidence reveals Fuentes possessed the firearm prior to the assault. (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) With respect to the *Mooc* request, review of the in camera hearing reveals no abuse of the trial court's discretion. We therefore affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

*1. The prosecution's evidence.*²

On December 16, 2009, at approximately 1:00 a.m., Sheriff's Deputies Byron Cwierz and Robert Lindsey were on patrol on Wilmington Avenue between 108th Street and Santa Ana Boulevard in Los Angeles when they saw Fuentes walking on Santa Ana Boulevard. Fuentes reached into his waistband and appeared "to manipulate some type of object in there." Believing Fuentes had a firearm, the deputies stopped the patrol vehicle near Fuentes. When Cwierz asked Fuentes to approach, Fuentes looked at the patrol car and ran. Cwierz chased Fuentes on foot and repeatedly ordered him to stop. Lindsey followed in the patrol vehicle.

¹ Subsequent unspecified statutory references are to the Penal Code.

Former section 12021, subdivision (a)(1) was repealed effective January 1, 2012. Its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). (See *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 1; Stats. 2010, ch. 711, § 6.)

² We summarize only the evidence necessary to address the sentencing issue raised by Fuentes.

When Cwierz got within 30 feet of Fuentes, Fuentes produced a handgun, turned and pointed it at Cwierz. Cwierz yelled, “Drop the gun,” and began to fire at Fuentes. Fuentes immediately fired two or three rounds at Cwierz and continued running. Cwierz took cover behind a car and saw Fuentes run to a residence, fire one more round and then enter the home. Cwierz fired a total of 16 shots.

Deputy Oscar Barragan searched the residence and found Fuentes in a bedroom. A .38 caliber revolver containing four expended cartridges was found in the attic. Fuentes suffered a grazing gunshot wound to the back of his head and a gunshot wound to the thigh. As Detective Dean Camarillo escorted Fuentes to paramedics, Fuentes said he was sorry for shooting at the deputy.

2. Defense evidence.

Fuentes testified he was walking to his home on East 107th Street when he saw the deputies. Fuentes ran because he was on probation, he had been smoking marijuana and he was carrying a firearm for his safety.³ Fuentes claimed the deputies exited the patrol vehicle and immediately started shooting at him, striking him in the back of his head and his thigh. Fuentes testified he fired only warning shots and did not point the gun at the deputies.

DISCUSSION

1. Because Fuentes possessed the firearm before he used it to assault Deputy Cwierz, the term imposed for possession of a firearm by a felon need not be stayed.

Fuentes contends he possessed the firearm only as a means of accomplishing the assault upon Deputy Cwierz. Because these offenses were not separated in time or place and constituted a continuous course of conduct against a single victim, Fuentes asserts he cannot be punished for both. (*People v. Perez* (1979) 23 Cal.3d 545, 551-554.) He

³ The parties stipulated Fuentes was on probation at the time of this incident following a conviction of violating Health and Safety Code section 11359.

claims the judgment should be modified to reflect a stay, pursuant to section 654, of the concurrent term imposed for possession of a firearm by a felon.⁴

Fuentes's claim is not persuasive. In *People v. Bradford*, the seminal case in the area, the defendant disarmed a highway patrol officer and then used the officer's weapon to fire at the officer and a passing motorist. *Bradford* held imposition of consecutive sentences for assault with a firearm on a police officer and possession of the firearm by a felon violated section 654.⁵ *Bradford* reasoned that “ ‘where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’ [Citation.]” (*People v. Bradford, supra*, 17 Cal.3d at p. 22, quoting *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.)

The instant case is easily distinguished from *Bradford*. Here, when the deputies first noticed Fuentes, he was manipulating an object in his waistband. Subsequent events showed this object to be a firearm. Also, Fuentes testified that, before he came into contact with the deputies, he was carrying a firearm for his safety. Thus, the evidence shows Fuentes possessed the firearm prior to the assault on Deputy Cwierz. Consequently, because Fuentes's possession of the firearm was “ ‘antecedent [to] and separate' from” its use in assaulting Deputy Cwierz, section 654 does not require a stay of the term imposed for possession of a firearm by a felon. (*People v. Bradford, supra*, 17 Cal.3d at p. 22; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1148-1149.)

⁴ Section 654, subdivision (a) states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

⁵ Where section 654 applies, concurrent as well as consecutive terms are prohibited. (See *In re Wright* (1967) 65 Cal.2d 650, 655.)

2. *Independent review of the in camera hearing.*

The trial court granted Fuentes's motion for discovery of the police personnel records of Deputies Lindsey and Cwierz regarding complaints of excessive force, dishonesty and any evidence of misconduct amounting to moral turpitude. (See *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531.) The trial court conducted an in camera hearing on August 24, 2010, but determined there were no records to be disclosed. Fuentes requests an independent review of the in camera hearing to determine if any citizen complaints were incorrectly withheld. (See *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1232.)

Examination of the sealed reporter's transcript of the in camera hearing reveals the trial court committed no abuse of discretion in finding no discoverable police personnel material in the deputies' personnel records.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.